Supreme Court, U.S.
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IN THE

**SUPREME COURT OF THE UNITED STATES**

October Term, 1997

No. 97-

ALASKA CENTER FOR THE ENVIRONMENT,
ALASKA WILDLIFE ALLIANCE,
TRUSTEES FOR ALASKA,
*Petitioners,*

v.

CARL S. ARMBRISTER, Director, Office of Planning and Program Development, Region 10, Federal Highway Administration,
FEDERAL HIGHWAY ADMINISTRATION,
ALASKA VISITORS ASSOCIATION,
CHUGACH ALASKA CORP.,
PRINCE WILLIAM SOUND ECONOMIC DEVELOPMENT CORP.,
ALASKA STATE DISTRICT COUNCIL OF LABORERS,
STATE OF ALASKA,
*Respondents.*

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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135 pp

## QUESTION PRESENTED

Can the Federal Highway Administration (FHWA) authorize construction of a road through parkland specifically protected from roads by Section 4(f) of the Department of Transportation Act, without finding, as required by *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971), that there is no feasible and prudent alternative?

## PARTIES TO THE PROCEEDING

The parties are:

Petitioners:

Alaska Center for the Environment
Alaska Wildlife Alliance
Trustees for Alaska

Pursuant to Supreme Court Rule 29.6, Petitioners state that they have no parent companies or subsidiaries.

Respondents:

Carl S. Armbrister, Director, Office of Planning and Program Development,
Region 10, Federal Highway Administration
Federal Highway Administration
Alaska Visitors Association
Chugach Alaska Corp.
City of Whittier
Alaska State District Council of Laborers
Prince William Sound Economic Development Corp.
State of Alaska

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Alaska Center for the Environment, *et al.*, hereby petition this Court for issuance of a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this case on December 15, 1997.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Alaska Center for the Environment v. Armbrister,* 131 F.3d 1285 (9th Cir. 1997)and is reprinted in the Appendix at 1-15. The decision of the United States District Court for the District of Alaska, which is not reported, is reprinted in the Appendix at 17-34. The original agency decision is reprinted in the Appendix at 35-54.

## JURISDICTION

The Ninth Circuit entered the opinion of which review is sought on December 15, 1997. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1993) and Supreme Court Rule 13.

## STATUTES INVOLVED

Department of Transportation Act, 49 U.S.C. § 303 (1997)

Federal-Aid Highway Act, 23 U.S.C. § 138 (1990)

## STATEMENT OF THE CASE

The case presents the strictly legal question of whether the Federal Highway Administration can fund the construction of a road through parkland without finding that an alternative project which avoids the parkland (an "avoidance alternative") entails unique problems, truly unusual factors, or cost or community disruption of extraordinary magnitude. Specifically, can FHWA reject a rail shuttle project that avoids parkland, and fund a road through the parkland, solely because more people would drive their cars on the road than would ride the rail shuttle? An affirmative answer would eviscerate Section 4(f) of the Department of Transportation

Act, which prohibits the construction of transportation projects in parkland except in the most extraordinary circumstances. The Ninth Circuit's decision conflicts with this Court's decision in *Overton Park* and with the decisions of several other Circuits.

This case carries significant implications for the Portage Glacier and Portage Lake Recreation Areas, extremely popular visitor attractions in Alaska, and for a national treasure, Prince William Sound. The case is also of national significance because the Ninth Circuit's opinion undermines the protection that Section 4(f) affords to all national parks, recreation areas, wildlife refuges, and other prized lands, many of which are located within the Ninth Circuit's jurisdiction.

## LEGAL BACKGROUND

Prior to the enactment of Section 4(f) in 1966,[1] federal and state highway departments often planned transportation projects on the basis of cost and convenience, with little regard for environmental impact. It was cheaper to build through parklands because the public landowners, unlike private landowners, did not have to be compensated for use of the land. *E.g.*, 114 Cong. Rec. 24,032-33 (1968) (remarks of Sen. Metcalf) (noting that local officials often built highways through parks or historic areas to save money); 112 Cong. Rec. 17,631 (1966) (statement of Sen. Yarborough) (noting numerous losses of parks and historic resources due to highway construction).

Congress became increasingly alarmed at the loss of and damage to parklands due to highway construction nationwide, and in response, declared in Section 4(f) a national policy that "special effort should be made to preserve the natural beauty of the countryside and public

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[1] 82 Stat. 824. Congress enacted similar language in the Federal Aid Highway Act of 1968, 23 U.S.C. § 138, and the two statutes are commonly referred to as "Section 4(f)."

park and recreation lands." 49 U.S.C. § 303(a); *see also* S. Rep. No. 1340, 90th Cong., 2d Sess. 18-19, *reprinted in* 1968 U.S. Code Cong. & Admin. News 3482, 3500 (emphasizing that everything possible should be done to preserve parklands and historic sites from destruction or damage resulting from highway construction). Section 4(f) prohibits the construction of roads through parkland unless there is no feasible and prudent alternative. 49 U.S.C. § 303(c); *see also* 23 U.S.C. § 138.

It was not long before a challenge to this environmentally protective statute reached the U.S. Supreme Court. *Overton Park* involved a proposed high-speed expressway through a 342-acre city park in Memphis, Tennessee. 401 U.S. at 406. Just as in this case, the U.S. Department of Transportation approved the project without explaining why it felt that there were no feasible and prudent alternative routes. *Id.* at 408.

This Court held that Section 4(f) required just such an explanation. In a landmark holding, the Court found Section 4(f)'s conservation purpose dictated that "protection of parkland is to be given paramount importance," *id.* at 412-13, and underscored that agencies must not sacrifice such prized lands for roads based on routine considerations of cost, directness of route, and community disruption which apply to all highway projects. The Court found that Section 4(f) constitutes a "plain and explicit bar" to the construction of highways through parkland, except in the most unusual situations. 401 U.S. at 411.

Accordingly, the Secretary may not fund a transportation project which uses parkland despite the presence of an alternative project which avoids parkland unless there are "truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reach[es] extraordinary magnitudes." *Id.* at 413 (emphases added). This holding has formed a pillar of environmental protection for parkland for the last 27 years. *See Proposed Highway Construction Through Overton Park, Memphis,*

*Tenn., Hearing Before the Subcomm. on Transp. of the Senate Comm. on Env't and Public Works,* 95th Cong., 2d Sess. at 22 (1978) (statement of William Futrell, Sierra Club President) (recognizing *Overton Park* as one of the Court's most important decisions this century); *see also Comment, Department of Transportation's Section 4(f): Paving the Way Toward Preservation,* 36 Am. L.Rev. 633, 635-36 (1987) (stating that Section 4(f) represents "one of the strongest substantive environmental laws in existence today.").

USDOT regulations restate the *Overton Park* interpretation of Section 4(f) as follows:

> Supporting information must demonstrate that there are unique problems or unusual factors involved in the use of alternatives that avoid [Section 4(f)] properties or that the cost, social, economic, and environmental impacts, or community disruption resulting from such alternatives reach extraordinary magnitudes.

23 C.F.R. § 771.135(a)(2).

In accordance with *Overton Park,* several Circuit Courts of Appeals have held that federal agencies must demonstrate truly unusual factors or extraordinary costs or community disruption associated with an avoidance alternative before funding a road or other transportation project which uses parkland. *See* section II, *infra.*

## FACTUAL BACKGROUND

FHWA and Intervenor-Appellee Alaska Department of Transportation and Public Facilities (ADOT) have decided to construct a $60 million road from Portage, Alaska, through two protected Recreation Areas to the town of Whittier, on the shores of western Prince William Sound. FHWA and ADOT expect that the vast majority of people who will visit western Prince William Sound are recreators who would travel during the summer months.

The state-owned Alaska Railroad Corporation (Alaska Railroad) provides the existing overland access to Whittier and western Prince William Sound. App. 59-66. Travelers board the train in Portage, and are transported approximately twelve miles through spectacular scenery including ice-capped mountain peaks and pristine valleys, before reaching Whittier and Prince William Sound. App. 65-66. The trip includes passage through two tunnels, which further adds to the unique nature of the experience. App. 65-66.

Many members of the public, particularly recreators, value the unique and enjoyable rail shuttle, App. 65-66, and a majority of riders who commented on the project are opposed to replacing the shuttle experience with a road which will degrade the Recreation Areas, and dramatically impact Prince William Sound. ADOT projects that the enormous increase in visitorship that the road will induce will cause significant increases in recreational boating and sportfishing, hunting, hiking, and camping. App. 67-71; 73-75. Western Prince William Sound is already at or near capacity for many of these activities,[2] and ADOT acknowledges that the road will have "major" impacts on the quality of the wilderness recreation experience in the Sound. ER 88.[3]

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[2] App. 84 (projecting an increase of more than 600 percent in recreation and sport fishing boats per day in Prince William Sound bays near Whittier by 2015); App. 67-68 (noting that goats are currently taken at maximum capacity, deer at near-maximum capacity, and that brown bears are currently over-hunted and in decline); App. 74-75 (noting that the rapid increase in visitation could leave agencies unprepared, and that impacts to fish and wildlife could be major).

[3] A significant portion of western Prince William Sound is included within the Port Nellie Juan-College Fiord Wilderness Study Area, which is managed by the U.S. Forest Service as a wilderness area. App. 88-89. The major

As an alternative to the road, FHWA and ADOT also considered an improved rail shuttle option, which would not be constructed through any property protected by Section 4(f). App. 92-96. Under this alternative, access between Portage and Whittier would be significantly improved by replacing the existing, somewhat antiquated train with two new locomotives, which would likely make hourly trips in each direction from 6:00 a.m. to 11:40 p.m. during summer, and eight round trips daily during winter. App. 92, 96-97. The agencies projected that visitation to Whittier wold increase six-fold by 2015 if the improved shuttle were implemented. This would constitute a dramatic increase in the level of service and visitation compared to the existing shuttle, while minimizing the adverse environmental impacts of transporting visitors. *Compare* App. 90-91 (discussing existing shuttle) *with* App. 92-99 (discussing improved shuttle).

In addition to the new train sets and operating schedules, the improved rail option would involve the construction of six loading platforms to replace the existing two, with parking lot improvements and amenities added in both Portage and Whittier. App. 93-94. With an automatic block signaling system, automated tunnel doors and ventilation systems, and new guard rails, the improved shuttle would be "as safe as any rail operation in the world." App. 106. ADOT estimated the cost of the improved rail option at $27.5 million, less than half the construction cost for the road. App. 99. ADOT further estimated the cost of a round trip ticket for an individual without a car at $8 ($5 in winter), App. 101-02 (51 per cent reduction from current $16 fare ($10 in winter)), comparable to the $12 cost per car for road access. App. 103-04.

Despite its favorable construction and user cost attributes, increased convenience, and unquestionably safe nature

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impacts for wilderness recreators include "displacement" or denial of the desired wilderness experience. App. 79-80.

compare to auto travel, ADOT repeatedly portrayed the improved shuttle project as unreasonable. *See* App. 107-111 (FHWA's discussion of ADOT's unfounded criticisms of the improved shuttle). During the administrative process, FHWA noted ADOT's excessive bias in favor of the road alternatives, and that ADOT did not

> adequately make the case that the improved shuttle is not a reasonable or feasible and prudent alternative. The [Final Environmental Impact Statement] will need to designate the improved shuttle as the preferred alternative unless all engineering and environmental factors together plus strong agency and public input convincingly demonstrate that truly unusual factors and problems of extraordinary magnitude exist with the improved shuttle.

App. 110.

Yet, FHWA ultimately chose to fund the road project without finding that the improved rail shuttle involved any truly unusual factors or problems of extraordinary magnitude. App. 38-39 (rejecting improved shuttle solely because it would not meet the project purpose and need). Instead, FHWA found that the improved shuttle would fail to satisfy the "corridor demand" for access to Whittier. "Corridor demand" is "essentially equivalent to the demand expected if there were road access with no toll," and thus equates to "road demand." App. 112-113. Thus, FHWA rejected the improved rail shuttle option because fewer people would ride the shuttle than would drive to Whittier, were a road constructed. FHWA did not contend that the relatively fewer numbers of rail travelers would cause any unique problems or truly unusual circumstances, and identified no unique problems associated with the improved rail shuttle whatsoever.

## PROCEEDINGS BELOW

In April 1996, Alaska Center for the Environment, *et al.* (ACE), filed a complaint in the U.S. District Court for the District of Alaska challenging FHWA's decision.[4] In the next year, as the merits were briefed and considered by the court, ACE twice moved for preliminary injunctive relief to halt road construction-related activities. The district court denied both motions. ACE appealed the latter denial to the Ninth Circuit, and the motions panel entered an injunction pending the district court's decision on the merits. The very next day, the district court entered summary judgment against ACE. ACE immediately appealed that decision, and the same motions panel of the Ninth Circuit preliminarily enjoined the project pending its decision on the appeal. After briefing and argument, the merits panel of the Ninth Circuit lifted this injunction without opinion. Six weeks later, the merits panel released an opinion affirming the district court's decision, an opinion which was later amended with no change in result. The Ninth Circuit also denied ACE's petition for rehearing en banc.

The Ninth Circuit held that, notwithstanding *Overton Park* and FHWA's own regulations, FHWA need not demonstrate any truly unusual factors or problems of extraordinary magnitude associated with the improved rail shuttle. FHWA need only show that the improved shuttle would fail to meet some stated project purpose or need. Because the improved rail shuttle would allegedly not satisfy the project "need" of meeting "corridor demand," FHWA could reject it on that basis alone. 131 F.3d at 1289.

## REASONS FOR GRANTING THE WRIT

In determining whether to grant a petition for a writ of certiorari, this Court considers, among other things, whether the decision below conflicts with a decision of this Court or

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[4] The district court had jurisdiction over the case pursuant to 28 U.S.C. § 1331.

other circuit courts of appeals. Supreme Court Rule 10(a), (c). The Court is less likely to review questions of fact, or alleged misapplications of a properly stated rule of law. Id. The Ninth Circuit's decision conflicts with this Court's opinion in *Overton Park* and with several opinions of other courts of appeals. Further, this case will not require the Court to review questions of fact or a misapplied rule of law, but rather an erroneously stated rule of law.

## I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH *OVERTON PARK.*

The Ninth Circuit eviscerated Section 4(f) by eliminating the requirement that the government demonstrate that truly extraordinary circumstances render an avoidance alternative imprudent. Instead, the Ninth Circuit held that the government must only craft a stated "need" for the project which an avoidance alternative would fail to achieve. Once it makes this showing, the government may build a road through parkland even though there is a prudent alternative within the meaning of *Overton Park.*

Specifically, the Ninth Circuit stated that

> FHWA rejected the rail system alternative because it did not satisfy the purpose of the project – to meet the demand for access into Whittier. In this circumstance, the FHWA is not required to make a further showing of 'unique problems' or 'truly unusual factors' associated with the rail alternative. . . . The FHWA did not act arbitrarily, capriciously, or abuse its discretion by rejecting an alternative which would not satisfy the purpose of the project.

131 F.3d at 1289.

As explained above, FHWA defined the "demand for access into Whittier" as that level of demand that would exist if a toll-free road were built. "Demand for access" was therefore

synonymous with "demand for toll-free road access," or "road demand." Not surprisingly, the record indicates that the demand for free road access exceeds the demand for access via rail shuttle, or any other mode of transportation. Thus, the only way to satisfy the "demand" for road access is to build a road. Any other project would, by definition, fail to meet one of the project's purposes, and is therefore imprudent according to FHWA.

This circular reasoning vitiates Section 4(f)'s strict prohibition against the construction of roads through parkland absent truly extraordinary circumstances. It allows the construction of roads through parkland with no showing that a viable avoidance alternative entails unique problems or extraordinary costs, contrary to Section 4(f)'s very purpose. Instead, FHWA must merely find that the avoidance alternative fails to meet *some* stated project objective.

In order to be consistent with *Overton Park,* however, FHWA must show that the *implications* of the avoidance alternative's failure to meet a stated project need involve truly unusual factors or unique problems. Otherwise, as in this case, agencies are free to skirt Section 4(f)'s mandate by artificially manipulating the statement of project purpose and need to ensure that viable avoidance alternatives fail to meet some portion of the stated purpose. Here, the primary project purpose is to substantially improve access to Whittier. *See Van Abbema v. Fornell,* 807 F.2d 633, 638 (7th Cir. 1986) (holding that agencies must reasonably articulate the primary project purpose, and not dictate an end result through artful drafting of the statement of purpose and need).

As explained above, the improved rail shuttle would provide safe, affordable, and convenient access to anyone who desires to go to Whittier. It would also generate significant levels of economic growth. Further, as FHWA admits, neither the improved rail shuttle's projected failure to meet "road demand," nor any other circumstance associated with

the project, causes any unique problems. The improved rail shuttle therefore satisfies the legitimate project purpose of significantly improving access to Whittier and western Prince William Sound, and is a "feasible and prudent" alternative pursuant to Section 4(f) and *Overton Park*.

## II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH OTHER CIRCUIT COURTS.

In addition to conflicting with *Overton Park*, the Ninth Circuit's decision conflicts with numerous decisions from other Circuits that uphold *Overton Park's* requirement that agencies demonstrate truly unique problems related to an avoidance alternative before rejecting it.

The Second, Fourth, Tenth, and D.C. Circuits have all continued to require federal agencies to make some showing of unique problems or truly unusual circumstances associated with an avoidance alternative. *See Monroe County Conservation Council v. Adams*, 566 F.2d 419, 423 (2nd Cir. 1977) (rejecting avoidance alternative which would disrupt a cemetery, university campus, and extensive residential areas); *Hickory Neighborhood Defense League v. Skinner*, 893 F.2d 58, 61-62 (holding that record contained no evidence of "imprudence" associated with avoidance alternative within the meaning of *Overton Park), after remand*, 910 F.2d 159, 163 (4th Cir. 1990); *Committee to Preserve Boomer Lake Park v. Dep't. of Transportation*, 4 F.3d 1543, 1550 (10th Cir. 1993) (finding that combination of more traffic congestion, substandard curves raising safety concerns, more residential and commercial relocations, and higher road user and construction costs rendered avoidance alternative imprudent); *Coalition on Sensible Transportation v. Dole*, 826 F.2d 60, 64 (D.C. Cir. 1987) (finding that use of long retaining wall bordering park, at times fifty feet high, could be regarded "grotesque" and sufficiently problematic to render avoidance alternative imprudent).

Other than the Ninth Circuit, only one Circuit Court of Appeals has stated that a federal agency may rely on its

stated project purpose, without more, can justify its rejection. *Druid Hills Civic Ass'n. v. Federal Highway Administration,* 772 F.2d 700, 715-16, n.18 (11th Cir. 1985). In *Druid Hills,* unlike in this case, the avoidance alternative was a "No Build" option, which would not satisfy the project purpose of relieving traffic congestion on major arterials, and thereby reduce excessive traffic in residential neighborhoods. *Id.* at 709, 715.

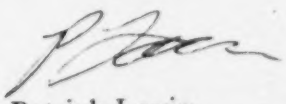
This split in the Circuits is "square": some Circuits require the government to demonstrate that an avoidance alternative involves truly unusual circumstances, and some do not. This lack of uniformity in federal law is the reason this Court considers a split in the Circuit Courts such an important factor in determining petitions for certiorari. *E.g., Yee v. Escondido,* 503 U.S. 519, 538 (1992) (noting that conflicting results in Circuit Courts is a substantial reason for granting certiorari pursuant to Supreme Court Rule 10); *Beaulieu v. United States,* 497 U.S. 1038, 1039-40 (1989) (White, J., dissenting from denial of certiorari because Circuits were split on a significant evidentiary issue). It is particularly imperative to resolve this conflict because much of the nation's federal parklands are located in the territory covered by the Ninth Circuit. *See Escondido,* 503 U.S. at 538 (noting special importance of resolving conflict among courts in interpreting law applicable to mobile home owners, given that a large percentage of mobile homes were located in the jurisdiction affected by the conflict).

## CONCLUSION

The Ninth Circuit's decision in this case undermines Congress' intent in enacting Section 4(f) and this Court's landmark opinion in *Overton Park.* It also conflicts with the majority of Circuit Courts, causes environmental harm to prized parklands in this case, and subjects much of the Nation's federal protected land to further harm in the future. This Court should therefore grant the petition for certiorari and should reverse the decision of the Ninth Circuit.

This Court should therefore grant the petition for certiorari and should reverse the decision of the Ninth Circuit.

Respectfully submitted,



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